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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1969.

No. [redacted] 197

ROBERT FOYE O'NEAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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To the United States Court of Appeals for the Fifth Circuit.

Petitioner, Robert Foye O'Neal, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 19th of March, 1969.

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition (Appendix A).

JURISDICTION.

The Judgment of the Court of Appeals for the Fifth Circuit was entered on the 19th of March, 1969 (Appendix B). Petitioner filed a Motion for Rehearing on the 29th of March, 1969. Said Motion was denied 6th of May, 1969 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Did the Court err in failing to sustain Petitioner's Motion to Suppress, Specification of Error 1?

(2) Did the Court err in failing to sustain Petitioner's Motion for Disclosure, Specification of Error 2?

(3) Did the Court err in failing to grant and sustain Petitioner's Motion for Directed Verdict of Acquittal, Specification of Error 3?

(4) Did the Court err in failing to charge the jury as requested by Petitioner's counsel, to-wit:

(a) with regard to the law of impeachment;

(b) circumstantial evidence;

(c) presence at a still;

(d) the laws of Admissions, Confession and Incriminating Statements, Specification of Error 4?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED.

The Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America; Rules 5 (a) and 41 (e), Federal Rules of Criminal Procedure; and 26 U. S. C. A., Sections 5173, 5179 (a), 5180, 5601 (a), 5602 and 5681 (c) (Appendix D).

STATEMENT OF THE CASE.

April 1, 1968, Petitioner was convicted in the United States District Court, Middle District of Georgia, for violating the Internal Revenue Code, on a four-count Indictment, it being charged he violated 26 U. S. C. A., Sections 5179 (a), 5601 (a), Count One; 26 U. S. C. A., Sections 5173, 5601 (a), Count Two; 26 U. S. C. A., Section 5602, Count Three; and 26 U. S. C. A., Sections 5180, 5681 (c), Count Four.

The evidence showed that State Revenue Agents Hendley and Bailey, while routinely investigating purported illegal liquor operations not associated with Petitioner, came upon an unoccupied automobile located approximately 50-75 yards from an abandoned house. When inspecting the house, outside they saw a man approaching. Upon commanding him to stop, the unidentified man, later identified as Duncan Padgett, Jr., fled toward the adjacent woods, shouting "Revenue Officer", time, 10:00 A. M. Hendley saw no one at the still. Bailey swore he saw three unidentified men running from the still site; having sworn three months earlier, in a previous trial, he had seen but two men fleeing the site. Prison trustees with dogs were called to track the men fleeing the still operation. They arrived 30-45 minutes later, and began tracking the men. Petitioner was not identified as the man approaching the abandoned house; nor was he identified and seen at the still site. Agent Barrett, Special Investigator for the U. S. Treasury Department, arrived at approximately 1:00 P. M.

2-7 miles from the still, the prison trusties came upon three men. They were standing next to a paved public road. After shouting at them, shots were immediately fired. The men broke and ran, but were later apprehended

a short distance therefrom. The men arrested were Duncan Padgett, Jr., Eddie Cooper, Jr., and Petitioner. At the time, the trustees had no warrant and had seen no one commit a crime. A short time later they were placed under the detention and supervision of the State and Federal agents, having been returned to the still site; time, 1:30 P. M.

The agents informed Petitioner of his Miranda rights, and later interrogated him. As a result of the interrogation, and Petitioner's purported comments at the site, Petitioner's ownership of the unoccupied automobile was determined, and testimony given that Petitioner claimed a field jacket found at the still. Evidence taken from the car was also introduced.

Petitioner was held at the scene until approximately 4:30-6:45 P. M., and then taken to Americus, Georgia, via Fitzgerald, Georgia, finally being placed in jail at 10:00 P. M. During the course of his detention, agents left the site for various reasons, including Agent Barrett. He left for Fitzgerald, Georgia, and remained away approximately 45 minutes—three hours. Petitioner was not taken before a committing Magistrate or U. S. Commissioner until the next day.

Petitioner was never identified as being one of the men, or a man, at the still site.

At no time did anyone have a warrant for Petitioner's arrest.

Petitioner's Motions to Suppress and Disclose were heard and denied March 27, 1968. They were renewed, insisted upon and overruled at the time of the trial. As alleged, Petitioner was convicted, and appealed. The factual statements made are taken from the Record, as identified in Petitioner's Brief and Motion for Rehearing.

REASON FOR GRANTING THE WRIT.

Question One. The Exclusionary Rule and/or Derivative Evidence Rule prohibits the introduction of any evidence discovered and obtained following an initial illegal arrest, detention, search or seizure. The subsequent discovery of incriminating evidence influences and plays no part in determining whether or not it is admissible. In all of the cases cited in Petitioner's Brief and Motion for Rehearing, previously filed, incriminating evidence was discovered, and its introduction improperly allowed. Reversals were later declared. Likewise, here, incriminating evidence was improperly offered and allowed. Respondent contends the evidence was properly allowed and the rule avoided and subverted, because Petitioner was informed of his Miranda rights. Nothing could be more fallacious! The evidence came by exploitation; it was the product of an illegal arrest, detention, search and seizure. It was obtained while Petitioner was illegally detained. At the time the prison trusties made the arrest, Petitioner had violated no law in their presence; had not been identified as one at the still, or seen at the still; the number of men fleeing the still was not known; he had not committed any act or acts giving rise to "suspicion and/or probable cause"; no one had a warrant; the arrest was made 2-7 miles from the still and approximately three hours after the men had fled; and the trusties had no authority to make an arrest.

As previously asserted, Respondent contends its discovery and use of incriminating evidence associating Petitioner with the illegal operation, was admissible and/or removed from the Exclusionary Rule by virtue of the Agent's citing **Miranda**. At the time this case was argued by counsel in New Orleans, the Court seemed to excuse the absence of a legal arrest, stating, "What you

are trying to say is you do not feel the incriminating evidence should be introduced for it convicted your client". This "observation" is in direct conflict with **Weeks v. United States, 232 U. S. 383; Mapp v. Ohio, 367 U. S. 643; Silverthorne Lumber Company v. United States, 251 U. S. 385; Wong Sun v. United States, 371 U. S. 471;** and other citations in Petitioner's Brief. Quoting **Miranda** did not rectify the situation, legalize the arrest or remove the bar of inadmissibility. Petitioner's illegal arrest resulted in his detention. His detention afforded the agents an opportunity for observation, detection and interrogation. Had not Petitioner been illegally arrested and detained, Respondent would not be the beneficiary of the purported statements and evidence later made and discovered. Without one, there would not have been the other. **Wong Sun v. United States,** *supra.* Nothing connected Petitioner to the car and jacket but his remarks made after the illegal arrest. Without this evidence, Petitioner's acquittal was demanded.

In keeping with **Professor Dession's** treatise on the Federal Rules, and **Mallory,** Petitioner's detention at the scene, and the failure of the Respondent to immediately bring him before a Magistrate or Commissioner, demands the avoidance of any information and/or evidence subsequently obtained. In addition to the support given by Rule 5 (a) to Petitioner's Motion to Suppress, the Sixth Amendment to the Constitution of the United States supports the authority and premise upon which the Rule is founded, stating Petitioner's right to be informed of the nature and cause of the accusation before and by a Commissioner or Magistrate.

Subsequent adherence to the law does not correct or purify initial wrongdoings and/or an initial illegal arrest. The "original sin" of evidence was not cured simply because the agent quoted **Miranda.**

We say the Fifth Circuit has decided this case adversely to the applicable citations of authority set forth in Petitioner's Brief and Motion for Rehearing, and failed to properly apply same. The effect of its decision under the evidence is an unwarranted extension of the rule permitting arrests without a warrant, and detention for unreasonable periods.

Question Two. Current legal thought, as is in part evidenced by the proposed new Georgia Criminal Procedure Act, Section 27-1407 (d), recognizes the value and necessity of a rule affording Defendants' rights of discovery, enabling them to make an informed-intelligent defense. Discovery of the truth being the object of all legal investigations, and trials, what acceptable reason can the Respondent give for objecting to the naming of the witnesses it intended to call. National security was not at stake! The only witness used in Petitioner's trial who was not called in the previous trial of Messrs. Padgett and Cooper, was Charles Mitchell Hoffman (R. pp. 90-99). His testimony was complex and technical. Neither Petitioner nor his counsel was able to intelligently comprehend, refute or question the information given. As the testimony was the most important given by a government witness, can it be denied Petitioner was harmed and prejudiced by the failure of the Court to direct Respondent to divulge the witness's identity? No! The Due Process Clause of the Fifth Amendment is meaningless and redundant if Respondent's denial is upheld. The rights afforded by the **Sixth Amendment, Constitution of the United States**, support Petitioner's Motion for Disclosure.

Question Three. Petitioner's arguments made in support of Question One, Specification of Error 1, are also applicable here; however, his Motion for a Directed Verdict of Acquittal will be strengthened if the Court favor-

ably rules thereon. If the evidence sought to be excluded by Petitioner's Motion to Suppress is not allowed, there is absolutely no evidence upon which to base a conviction. Succinctly, can it be denied that a manifest miscarriage of justice resulted? No! As pointed out in Petitioner's Motion for Rehearing, if a Defendant cannot be convicted because of his mere presence at a still, how can he be convicted because his jacket was found at a still, or his car was found seventy-five plus yards from a still? There is absolutely no evidence in the Record connecting Petitioner with the illegal operation. He was never placed, seen or identified at the still, until his return after the trustees' illegal arrest some two miles plus distant.

Petitioner's motion simply states his conviction was unwarranted on general grounds. The Fifth Circuit's decision affirming Petitioner's conviction is adverse to the holdings in **United States v. Romano, et al., 330 Fed. 2d 566 (1964); Vick v. United States, 216 Fed. 2d 228;** and **Girgento v. United States, 81 Fed. 2d 741, 742.**

Question Four.

(a) Impeachment—David E. Bailey's testimony (R. pp. 71-76), coupled with Petitioner's request that the Court charge the law of impeachment, clarifying for the jury the effect, significance and meaning of his contradicting sworn statements, and instructions on how they may and/or should be considered and applied, demanded the Charge, as requested. The Charge given was incomplete, and did not adequately and sufficiently state the law of impeachment, denying Petitioner a valuable right of trial practice and procedure. Petitioner's arguments heretofore given in his Brief and Motion for Rehearing state the case.

(b) Circumstantial Evidence—During the course of the trial (R. p. 122), Respondent's counsel objected to Peti-

tioner's counsel's statement of the law of Circumstantial Evidence. The objection highlighted the significance and application of the Rule, and made it even more important and mandatory that a complete and clear definition of the same be given by the Court, as requested. Petitioner's Brief and Motion for Rehearing argue the validity of the Request to Charge.

(c) Presence at a Still—The decisions heretofore cited under Question Three, Specification of Error 3, are applicable.

(d) Admissions, Confessions and Incriminating Statements—The assertion of error (omission) states a basic and prejudicial error, entitling it to consideration. For the purpose of this appeal, it "excuses" counsel's failure to assert error at the time of trial.

The arguments set forth in Petitioner's Brief and Motion for Rehearing were further elaborated upon by a Letter Brief dated April 3, 1969, addressed to the Honorable Edward W. Wadsworth, Clerk, Fifth Circuit, citing **Mercer Law Review, Vol. 20, pp. 81-82.** The article cites **Norrell v. State, 116 Ga. App. 479, 157 S. E. 2d 784 (1967).** The Court's charge on confessions was held to be error for the reason that the statement was not a confession but, at most, an admission. The terms "confession" and "admission" are defined. We again ask the Court's review of the citation.

Petitioner attaches hereto as Appendix E, his Brief, Brief of Appellant, filed in the Fifth Circuit, Case Number 26,081, making it a part and parcel of his argument in support of the Petition for Certiorari.

CONCLUSION.

For the foregoing reasons, Petitioner asks that his Petition for Certiorari be granted in order that the Questions may be determined.

Respectfully submitted,

.....

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I hereby certify that I have this date served opposing counsel, Mr. Walker Johnson, Assistant U. S. Attorney, U. S. Post Office Building, Macon, Georgia, with a true and correct copy of the above and foregoing Petition for a Writ of Certiorari by placing the same in a properly addressed envelope, with the correct amount of postage affixed thereto, in the U. S. Mail.

This ..... day of May, 1969.

.....

T. Malone Sharpe.